profitably -- but if it is not paying fair market value for that use, society as a whole may be worse off.[85]

In summary, the industry's arguments against paying a fee related to cable modem service have no basis in economics

It. The Industry Argument on Fees Is Predicated on an Error of Fact.

Across the board, the industry states that cable modem franchise tees are not warranted, as there is no additional physical burden on the right-of-way.[86] Yet, there is little elaboration on this point by industry commenters They seem to think that by saying it is so, they can make it come true.[81] As noted by ALOAP in our initial comments, however, cable modern facilities do place an additional burden on the right-of-way, so one of the basic predicates for the industry argument is wrong.[88]

ALOAP asked the authors of the CTC Report to review the industry's assertions regarding right-of-way burdens. As noted in their supplemental report, attached hereto as

[85] We note here that so long as cable modern service was a cable service, the maximum fee was five percent of gross revenues from the *service.* While most local governments consider that amount to be less than access to the right-of-way is worth, it was accepted as a compromise.

[86] Comments of Charter at 21-22; Comments of AOL Time Wamcr at 14-15, 26; Comments of Cablevision at 16; Comments of NCTA at 47; Comments of Comcast ai 31; Comments of AT&T at 38-39.

[87] *Id*

[88] *See* Andrew Afflerbach, David Randolph, "The Impact of Cable Modem Service on the Public Right of Way," June 2002 (the "CTC Report") attached to our initial comments as Exhibit G. *See also*, E. Sandino, Executive Director Networking AT&T Broadband, "Preparing the Broadband Network for the Launch of Advanced Interactive Services" Engineering and Operational Considerations Proceedings Manual, Cable TEC 2001, ai 21-55 (discussing network architecture changes necessary to deliver advanced services, including need for more return bandwidth, increased fiber counts, additional notes, and for extending fiber io the home); S. Benington, "Strategic HFC Migration and IP-Based Multiservices," Proceeding Manual, Cable-TEC 2001, at 403, 404 ("Nrlwork Upgrades to two-way plant are prerequisite [for delivery of cable modem service].")

Exhibit D, the authors, both Principal Engineers with the engineering firm of Columbia Telecommunications Corporation, and acknowledged experts in the field of cable television engineering, point out that in addition to the burdens arising out of differences in engineering design pointed out in their initial report, cable modem service imposes another, very extensive additional burden on the rights-of-way: the need to install conduit to protect fiber optic cable. The coaxial cable used in traditional cable systems can be buried directly in the ground – but operators must replace much of that coaxial cable with fiber optic cable when they upgrade their systems to provide cable modem service. So there is a very basic and significant difference between the burdens imposed by the construction of the two types of systems.

In addition, we note that the two CTC reports deal only with the current practices in the industry. They do not speculate about possible future needs or changes in practices. If current systems prove inadequate, or if greater demand for cable modem service does develop in the future, the replacement facilities will place additional burden on the rights-of-way. For example, if the long-sought "killer app" ever arrives, one cable industry analyst has stated that bandwidth requirements may be "orders of magnitude more than today."[89] Upstream bandwidth needs could increase sharply, requiring the construction of additional nodes and hubs and even additional small headends.[90] This would not be the case with a video-only system. A truly broadband system is fundamentally different from a cable video system.

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[89] Todd Outberg, Sr. Engineering Manager, ADC Telecommunications, "Digital Data Demand: Explosion Scenario. A Cable Modem Board Network Analysis," address at Cable TEC Expo 97.

[90] Cable operators have anticipated this problem to some degree, by designing and building "scalable" networks that allow for relatively easy expansion of bandwidth. But if this is not done, new nodes and other equipment may be required in the rights-of-way. *See, e.g.* E. Schweiter, J. Tinol, J Doblegust, "Scalable Architectures that Hrenk the Bandwidth Barrier for Digital Services." Proceedings Manual, Cable PEC Expo (June 98), at 235-36. And even a scalable network will have bandwidth limits which may be exceeded if demand reaches unanticipated levels

Another potential – and very likely – source of increased demand that could lead to increased use of the rights-of-way is the expanding small business market. Cable operators traditionally viewed their service as only a residential service, and often do not extend their networks deep into business districts. But small businesses have become a growing market for cable modem service – and this requires extending networks into parts of communities that often were not served by traditional video networks.[91]

Preemption based on false presumptions about the potential right-of-way burdens of cable modem deployment would rob local governments of the ability to obtain full and fair compensation for the use of their property

C. Section 622 Does Not Prohibit Cable Modem Franchise Fees.

Even if the industry were correct as to the right-of-way impact, local governments can still charge a franchise fee consistent with Section 622, without relying on any authority in Title VI. As ALOAP showed in its initial comments, Section 622 does not prohibit (and could not prohibit) imposition of a franchise fee on cable modem service. *See* ALOAP initial comments at 44-51. In brief, the 1996 amendment to § 622 was not intended to exclude cable modem franchise fees, as demonstrated by the legislative history.[92] In fact, Section 622(g) clarifies that cable modem franchise fees are permitted.[93] Furthermore, as we cannot stress enough, under § 601(c) of the 1996 Act, the authority of local governments to impose franchise fees cannot be

[91] J. Yatsko, "Unlocking the Full Potential of HFC Networks with Integrated IP Broadband Services," Proceedings Manual, Cable TEC Expo 2001 (May 2001), at 179. "Small and Medium business (5 to 100 employees) will represent a significant market opportunity for broadband service providers ... [C]able is well positioned to serve this segment with a wide array of new services .... Current and future Internet Applications and Services will continue to stress the probabilities of today's broadband networking." *Id.* at 179-80.

[92] Comments of ALOAP at 13-46

[93] Comments of ALOAP at 46-47

preempted.[94] There is no express statutory preemption. Therefore, there can be no preemption at all. Any attempt at preemption raises important Constitutional issues. The right of local governments to regulate the use of public land is an essential attribute of state sovereignty.[95] Local governments, as a general principle, are entitled to recover fair market value for locally-owned land.[96] The industry's right-of-way burden argument cannot trump the Fifth Amendment, the Tenth Amendment, or the federal structure of our government. Nothing in Section 622 alters those basic considerations

I). Fees Cannot Re Avoided hy Arguing that They Are Taxes or "Revenue Producers."

Franchise fees are not a tax, but a form of rent.[97] As noted **even** by many in the industry, the purpose of a franchise fee is to provide compensation for use of the right-of-way.[98] The industry asks the Commission to repeat its error in the Dallas franchise fee case, namely, that local government's franchising is akin to imposing a tax. This concept was rejected by the Fifth Circuit, and the error should not be repeated. "Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. *See, e.g., City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 37 L.Ed. 380 (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax); *Pacific Tel. & Tel.*

[94] Comments of ALOAP at 47.

[95] Comments of ALOAP at 47-49.

[96] Comments of ALOAP at 49-51.

[97] *State Freight Tax Case*, 15 Wall. [82 U.S.] 232, 278 (1872); *City of St. Louis v. Western Tel. Co.*, 148 U.S. 92, 97-98 (1893) *opinion on reh'g*, 149 U.S. 465 (1893); *Western Un. Tel. Co. v. Richmond*, 224 U.S. 160, 169 (1912); *Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98 (1997) ("Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent *use* of public rights-of-way.") (emphasis supplied).

[98] Comments of Cox Communications at 45; Comments of Cablevision at 16; Comments of AOL Time Warner at 13-14; Comments of AT&T at 38.

Co. v. City of Los Angeles, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (1955) (same); *Erie Telecommunications v. Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same in cable television context)."[99] The analysis does not change merely because the fees are placed in a general fund.[100] There is no general legal principle that says that compensation for the use of property can only be expended for certain purposes, or cannot be used for purposes that are unrelated to the use of the property. Private businesses routinely commingle their revenue from different sources in common or general funds, and use their general revenues to pay all sorts of expenses. Absent a specific legal restriction, local governments are free to do the same. A revenue source – such as compensation for the use of rights-of-way - used to pay general expenses, or to perform governmental functions without increasing taxes, does not convert the revenue into a tax. There are particular factual circumstances under the laws of particular states that limit this general rule. But those circumstances and laws are not at issue here.[101]

[99] *City of Dallas v. FCC*, 118 F.3d 393, 397-98

[100] Furthermore, Section 622(i) bars the Commission from regulating the use of franchise fees

[101] The Arizona Cable Telecommunications Association ("ACTA") claims that franchise fees violate the Commerce Clause of the Constitution. Comments of ACTA at 19-23. While there are instances where gross receipt assessments have been found improper, these cases are not analogous to this situation. In the main case relied upon by the commenters, *Fisher's Blend Station v. Tax Comm'n of State of Washington*, 297 U.S. 650, 655, (1936), the Court found that a tax on broadcasters that was computed on the basis of gross receipts violated the Commerce Clause, because "[b]y its very nature broadcasting transcends state lines and is national in its scope and importance characteristics which bring it within the purpose and protection, and subject it to the control, of the Commerce Clause." The Court went on to find that "[a]s appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce." *Id.* This case is not relevant to this proceeding for one simple reason: cable rnodcm franchise fees iire not a tax, but a form of rent lor use of the righi-of-way. Further, the fee paid to a particular franchising authority is based only on revenues derived from service provided to users within that community - unlike the broadcasting case, where the revenue base included revenues attributable to services provided outside the state

For the same reasons, those commenters that argue that franchise fees are "revenue producers" completely miss the point.[102] Local governments must be prepared for any emergency – national, regional or local – and the management, control and maintenance of the public rights-of-way are critical to the nation's emergency management systems. In addition, it is clear that all forms of communication to our citizens are of paramount concern when a crisis occurs, and the fact that local governments use some of these funds for the provision of communications with citizens should not be overlooked. In any case, the claim that franchise fees yield net revenue has no factual support. Municipal governments expend hundreds of billions of dollars a year on street construction and repair. The amount collected in right-of-way rents does not come close to paying all of these costs.

But even if franchise fees do generate net revenue, nothing in federal law precludes that result. The fact remains that, from an economic perspective, local governments have a right to charge rent and cable modem service providers do not want to pay.

E. Industry Reliance on the Internet Tax Freedom Act is Misplaced.

The Internet Tax Freedom Act (the "ITFA") permits the imposition of a franchise fee on cable modem service.[103] Many industry commenters argue that a franchise fee would violate the ITFA.[104] They come to this conclusion either by not mentioning the provision of the ITFA that expressly excludes franchise fees, or by arguing that a fee on cable modem service would

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[102] *See, e.g.*, Comments of Comcast at 30; Comments of *Cox* Communications at 52.

[103] Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-04, 112 Stat. 2681, 2681-719 (1998), 47 U.S.C. § 151 nt.

[104] Comments of Cox Communications at 52; Comments of Comcast at 30; Comments of Charter at 17-18

amount to a tax, not a franchise fee. The ITFA, however, plainly excludes franchise fees from its purview It states that:

> (8) Tax.—
>
> (A) In general.--The term 'tax' means—
>
> (i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or
>
> (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use lax imposed on a buyer by a governmental entity.
>
> (B) Exception.--Such term does not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573), or any other fee related to obligations of telecommunications carriers under the Communications Act of 1934.

Section 1104(8)(b), codified at 47 U.S.C. § 151 nt

Any reading or characterization otherwise is blatantly false or contrived. The Congressional directive is clear franchise fees on cable modem service are not a tax within the meaning of the ITFA, or in any other Act. for that matter.[105] At the time IFTA was written, cable modem service was covered by these sections. The authors of IFTA, like the local governments here, had no way of knowing the Commission would choose to interpret ihe statute as it has now done. Once again, the cable industry is asking the Commission to preempt where Congress clearly chose not to preempt. No matter how much the industry may want the Commission to preempt, the Commission has no power to do so. The industry's need to cite wholly irrelevant provisions such as the I I ti\ serve merely to emphasize the intellectual poverty of the case for preemption

[105] *See* H.H.Rep. No. 105-570(II), at 26 (1998) ("This subsection also states that cable television franchise fees or similar fees should not he construed as taxes.")

IV. FRANCHISING REQUIREMENTS SHOULD APPLY TO CABLE MODEM SERVICE.

The industry commenters make three basic arguments against the franchising of cable modem service. First, they argue that local franchising authority is based upon use of the rights-of-way and that because cable modem service allegedly does not constitute an additional use or impose an additional burden, there is no basis for franchising.[106] As explained above, this argument is fatally flawed because it depends on the false assumption that there are no differences in design and construction between systems capable of providing cable modem service and systems that can offer only cable service. *See also* CTC Report and Supplemental CTC Report, attached hereto as Exhibit D.

Second, many industry commenters try to argue that the Cable Act itself preempts local governments from franchising information services, relying primarily on Sections 621 and 624.[107] These sections do not apply, as discussed below.

Third, the industry claims that existing cable franchises provide all the necessary authorization to construct and maintain the facilities necessary for cable modem service, thereby eliminating the need for further regulation.[108] Further, they argue, any attempt to franchise

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[106] *See* Comment of Cox Communications at 45; Comments of AOL Time Warner at 14-15; Comments of NCTA at 47-48; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 14; Comments of AT&T at 38.

[107] Comments of Cox Communications at 47-48; Comments of Arizona Cable Telecomm. Ass'n *et al* at 15; Comments of AOL Time Warner at 27; Comments of AT&T at 34, 37-39.

[108] Comments of AOL Time Warner at 14-15, 26; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 14; Comments of NCTA at 47-49; Comments of Cablevision at 16; Comments of Cox Communications at 42-45

information services would constitute duplicative regulation, and should be disallowed as contrary to Commission policy.[109] These claims are incorrect, as discussed below.

A. Title VI Does Not Forbid an Information Services Franchise Requirement.

Despite the claims of the industry, there is nothing in Title VI that eliminates the ability of local governments to require a franchise for cable modem services. In Point II, *supra*, we discuss the structure of the Communications Act and of Title VI, and demonstrate that the Act preserves local authority over information services, and that the Commission has no power to preempt that authority. Here we address the industry's claims that Title VI actually prohibits franchising of information services.

The first industry argument is that Section 621(a)(2) requires that a franchise authorize the construction of a "cable system," and therefore that once a franchise is issued, it must authorize the provision of any service over that franchise. The trouble with this argument is that an examination of the language of Section 621(a)(2) demonstrates that the statute has nothing to do with limiting local authority. The provision is nothing more than a description of what physical property is affected by a franchise. Its fundamental purpose is to make clear that a franchise permits access to the public rights-of-way and to certain private easements. The section says:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and have been dedicated for compatible uses, except that in using such easements, the cable operator shall ensure—

[109] Comments of Cable Telecomm. Ass'n. *et al* at 15; Comments of AT&T at 45-46; Comments of NCTA at 48. NCTA believes that the Commission has addressed the question of duplicative regulation in regards to § 253, but as discussed above, § 253 does not apply here, and should not be determinative.

(A) that the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
(B) that the cost of the installation, construction, operation or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation or removal of such facilities by the cable operator.

The legislative history of the 1984 Act further supports the point that Section 621(a)(2) was enacted simply to ensure that dedicated easements could be used to provide cable service;

> Subsection 621(a)(2) specifies that any franchise issued to a cable system authorizes the construction of a cable system over public rights-of-way, and through easements which have been dedicated to compatible uses. This would include, for example, an easement or right-of-way dedicated for electric, gas, or other utility transmission. Such use is subject to the standards set forth in Section 633(B)(1(A), (B), and (C). Consideration should also be given to the terms and conditions under which other parties with rights to such easements and rights-of-way make use of them. Any private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable. [10]

The industry commenters seize on the reference to "cable system" in the first line of the statute and ignore the rest of the section. The section *is* clearly a statement of what property Congress deemed within the scope of a franchise, once granted, and therefore, what property could be occupied by a cable operator once it received a franchise. It does not mean that granting a franchise to build a cable system precludes other local government requirements and limitations. Nor does it grant the right to use the rights-of-way in any way an operator might choose.

In addition, parties to a franchise contract can agree to limit the scope of a franchise by agreement, with the understanding that additional authorizations may be obtained later. This is precisely the industry's practice.

The second statutory provision the industry commenters rely on is Section 624. Here they argue that Section 624(a) prohibits any regulation of a cable operator's services, facilities and equipment except to the extent consistent with Title VI, and that Section 624(b) prohibits a franchising authority from establishing any requirements for information services. The first flaw with this argument is that by ruling that cable modem service is not a cable service, the Commission has removed cable modem service from the scope of Title VI and therefore of Section 624. Second, even if Title VI does still apply, Section 624 does not restrict franchising of cable modem services because nothing in the Act prohibits local governments from requiring additional franchises for non-cable services. For example, the language of Section 624(a) is only a negative mandate: it says that any regulation of a cable operator's services, facilities and equipment must be consistent with Title VI. But Title VI does not by its terms preclude separating franchising for cable modem service providers. Indeed, it has very little to say about information services, and what little it does say is not inconsistent with a separate franchise requirement.

In addition, a cable modem service provider is not necessarily a cable operator. The Commission has deemed the two categories to be distinct. It is possible for a cable modem service provider not to provide cable service. Thus, Section 624(a) says nothing about the franchising of information service providers in general. Finally, by its own terms Section 624(a) says nothing about franchising. This is important because the provision of the Cable Act that endorses franchising as a mechanism is Section 621. If Congress meant to ban the franchising of information services, it would have done so in that section. Indeed, it is in Section 621(b)(3) that Congress addresses limitations on local authority regarding telecommunications services. Any

[110] H.R. Rep. No. 98-934, at 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696

parallel or analogous requirements regarding information services would appear in Section 621(b) or at least elsewhere in Section 621. In short, if Section 624(a) applies at all it does not forbid franchising – and a local government has broad authority to adopt franchising requirements related to information services. *See Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999).

With respect to Section 624(b) the same argument applies: it may be that a cable franchise may not contain requirements for information services, but that does not mean some other franchise may not.[11] Furthermore, the prohibition in Section 624(b) refers only to establishing requirements in a request for proposals for a cable franchise; it does not by its terms preclude a separate franchise. In fact, Section 624(d)(2) allows a franchising authority to enforce requirements for facilities and equipment and for broad categories of "other services." So Section 624(b) is not a bar to an information services franchise.

Nor do the industry's arguments deal with the fundamental problem that the Commission faced in the OVS appeal, *Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). Unless there is an express preemption of local franchising authority in the Communications Act, that authority remains. Congress must make its intention "clear and manifest" if it intends to preempt the traditional powers of the States. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). The power to franchise the use of the rights-of-way is a traditional power of local government.

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[11] Incidentally, as we noted in our opening comments, ALOAP's position in this docket assumes that the Commission's classification of cable modem service is correct. As the Commission knows, ALOAP has challenged that classification in the appropriate forum, and ALOAP strongly disagrees with the Declaratory Ruling. Indeed, the Commission's classification has needlessly and improperly complicated this issue, as the comments of the various parties illustrate. Having said that, nothing in either ALOAP's initial comments or these reply comments should be taken as an admission that the Declaratory Ruling was correct for purposes of any other proceeding.

Sections 621 and 624 contain no clear and manifest intention to preempt franchising authority over information services

In a related argument, Charter makes the simplistic assertion that "LFAs may franchise systems but not services."[112] The problem with this argument is that the statute does not support it. Nothing in the Cable Act requires issuance of a franchise that permits the franchisee to provide any service whatsoever; and if the operator demands a franchise to provide multiple services, then the operator can be required to pay fees, and be subject to lawful regulations associated with those services. The key cases cited by Charter do not apply to the scope of regulation of information services under Title VI; indeed, the principal case Charter relies on, *City of New York v. Comtel, Inc.*, 293 N.Y.S.2d 599 (N.Y. Sup. Ct. 1968), predates the Cable Act by 15 years. In the other cases relied on by Charter, the courts read the statutory definitions of "cable operator" and "cable system" narrowly and literally, in ways that limited the applicability of Title VI. To the extent that they say anything about alleged "duplicative" franchise requirements, we demonstrate elsewhere that there is no such duplication. Furthermore, Charter's cases assumed the existence of an adequate regulatory structure. For instance, in the case of video dial tone, the Commission had expressly held that video dial tone was a common carrier service, and the court upheld the decision to preclude video dial tone providers from getting cable franchises because of the existence and applicability of common carrier regulation.[113] In this case, the choice is not between two different regulatory schemes, because the Communications Act does not lay out a scheme for regulation of information services. There is no title of the Act devoted to those services. The choice *is* instead between allowing local

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[112] Comments of Charter at 27.

[113] *National Cable Television, Inc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994)

governments to exercise their traditional powers, and no regulation at all. This is a fundamentally different factual situation from the facts in *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); *City of Austin v. Southwestern Bell Video Servs., Inc.*, 193 F.3d 309 (5th Cir. 1999); and *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

As a related point, AOL Time Warner argues that some States do not authorize information services franchises.[114] While this may be correct, and we have not done a state-by-state survey, Time Warner's examples would seem to indicate the opposite. The New York and Arizona statutes cited by AOL Time Warner do not actually prohibit franchising of information service providers -- they are merely silent on the subject. Thus, those two statutes simply do not support the proposition for which they are cited.

The Michigan statute,[115] recently passed by the legislature, is not effective until November of this year, and is currently under Constitutional review by the Michigan Supreme Court. In any case, AOL Time Warner's point supports our argument that absent a state law prohibition, local governments can franchise information service providers.

B. A Cable Modem Franchising Requirement Is Neither Duplicative Nor Unnecessary.

The industry argues that a franchise *for* cable modem services is duplicative and unnecessary. Here the industry is trying to have its cake and eat it too: essentially they are saying that cable modem service and cable service are not the same thing, but that local governments can protect any interests they may have regarding cable modem service in the form

[114] Comments of AOL Time Warner at 30 (citing statutes from NY, AZ, and MI).

[115] The Michigan Supreme Court has granted the Michigan House of Representatives' request for an advisory opinion on the Constitutionality of his legislation. Briefing is complete, and the Court has not yet submitted its opinion. *See* Order, In re 2002 PA48, House of Representatives' Request for an Advisory Opinion, S.C. No. 121394 (Mich. May 28, 2002).

of cable franchises. The truth is that if cable service does not include cable modem service– as the Commission has announced - then there are substantial and significant differences between the two that require separate treatment. Furthermore, by declaring them to be separate things, the Commission has forced local governments to treat them separately. If anything, the Declaratory Ruling is an argument for and an invitation to require separate franchises.

As noted by some commenters,[116] many new issues regarding cable modem service have arisen since the inception of the service. Although there are many points of identity or similarity between the issues raised by traditional cable service and cable modem service, there are also important points of difference. Local governments and the industry continue to work through these new problems, including open access, speed of access, management of new and disruptive facilities, upgrades, and red-lining, among others. Because of these new and different problems, requiring franchises for cable modem service is not duplicative – many of these issues are not addressed in current franchises, or, conversely, communities have negotiated terms that account for the operational differences between cable modem service and traditional video service.

Furthermore, if cable modem service is not a cable service, cable operators will eventually argue that the terms of their cable franchises do not apply to cable modem service. Operators have already made such statements to franchising authorities in connection with customer service requirements, and the Commission staff has noted the possibility that local authority is preempted.[117] If freed by the Commission from direct local regulation of cable modem service, the next step will be for operators to claim that other existing franchise and local code provisions – even provisions dealing with facilities – do not apply to cable modem service.

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[116] Comments of NCTA at 23; Comments of Comcast at 13-14.

[117] *See* letter from K. Dane Snowden, Bureau Chief, Consumer and Governmental Affairs Bureau, to Kenneth S. Fellman, LSGAC (May 14, 2002) ("Snowden Letter").

So that, for example, new construction that is asserted to be related to cable modem service will be claimed to be beyond local oversight and inspection. Such attempts to avoid all local control over facilities used to deliver cable modem service would be unreasonable in light of the arguments made by the industry in this proceeding -- but the possibility is near term.

In light of the multiple services to he provided over the cable system, local governments will have to engage in additional oversight, not less, to ascertain whether work in the right-of-way is related to the provision of traditional cable service covered under the franchise agreement, or whether the work is related to the provision of Internet services, and whether that work is permitted under the terms of any existing agreement. By removing cable modem service from the existing cable franchising process, the Commission might even force changes in the construction permitting process and new requirements for information from the operator on the need for and purpose of each new intrusion into the right-of-way. For instance, cable upgrades that include Internet service facilities (*i e* . power boxes, etc.) fall outside existing rules and contracts. So long as cable modem service was a cable service, this was not an issue.

In summary, it is simplistic and ultimately false to assert that existing cable franchises are all that is needed to deal with the legitimate concerns of local governments related to cable modem service.

V. REGULATION OF CABLE MODEM SERVICE IS CONSISTENT WITH EXPRESS PROVISIONS OF THE CABLE ACT.

While most of the industry's arguments are addressed in sections I-II above, it bears emphasizing that the industry ignores the fact that the plain language of the Cable Act does not prohibit regulation of non-cable services except in very specific areas. What the industry fails to confront nre the provisions that authorize regulation of non-cable services. These include 47 U S C. §§ 541(d)(1), 542(b), 542(h), 544(b)(1), 546(c)(1)(B), 551, 552, and 554. *See* AT.OAP's

Comments at 30. The industry commenters presented no legal theory that reconciles these provisions with their arguments. They have not done so and cannot do so.

This failure to confront existing statutory authorities along with unsupported assertions that local regulation is inconsistent with the Commission's actual regulatory mandate, leads to the inevitable result that the Commission cannot preempt local franchising authority.

VI. THE REPAYMENT OF PAST FRANCHISE FEES IS A QUESTION OF LOCAL JURISDICTION.

A. The Commission is Not the Proper Forum for Addressing the Issue of Past Fees.

The industry argues that the Commission can and should resolve the refund of franchise fees issue.[118] Industry commenters are concerned about consumer class action litigation on the matter, and want the Commission to decide the question as a matter of national policy. Local governments do not relish the idea of class action litigation on the subject, but the fact remains that national intervention is not required, as noted in ALOAP's initial comments at 64-65. Long-standing state law doctrines already exist regarding past payments, and the merits of any claim for repayment will depend on the terms of local franchises, the facts of each case and state law. We also note that a federal district court recently ruled that there was no private right of action in this regard. *Kimberly D. and William L. Bova v. Cox Communications, Inc.*, 2002 WL 1575738 (W.D. Va. 2002).

It is also doubtful whether the Commission has authority over the issue. Having decided that cable modem service is not a cable service, the Commission must now rely on whatever authority it has under Title I to take any action regarding cable modem service. But that

[118] Comments of NCTA at 52-54; Comments of Cox Communications at 59-64; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 24-26; Comments of AT&T at 47-48.

authority is severely limited. There is no provision of the Act that says that the Commission can regulate either cable modem service rates or franchise fees. Thus, it is difficult to see how the Commission's ancillary authority could he used to reach out and address the matter of refunds [119] The Commission would riot be filling in gaps in the regulatory scheme– it would be creating a regulatory scheme. This is especially so in the face of the existing state law doctrines. If only federal law were implicated, the argument that the Commission can bar repayment would be weak enough – but when state law addresses the issue and Congress has not given the Commission express authority, any attempt to apply Title I must fail. While we agree that local governments and the industry have defenses against the repayment of past fees, this is an issue that can only be decided on a case-by-case basis, with reference to the terms and effective date of each franchise

B. Many Local Governments Arc Barred by Their Stale Constitutions From Repayment.

Most state constitutions contain "anti-donation" clauses that limit the recovery of past payments made to a local government. Any repayment by a local government of franchise fees could be considered an unlawful gift under these provisions. Although the particular language varies from state to state, these provisions generally make it unconstitutional for local governments to make gifts of money or properly to individuals or corporations in all but very narrow circumstances, usually involving social welfare programs. See, *e.g.*, Ariz. Const. art. IX, § 7; Md. Const art. 111, § 34; Ill. Const. art. VIII, § 1(a); Wash. Const. art. VIII, § 7. The Washington provision *is* representative:

[119] *See, e.g., CCIA*, 693 F.2d at 211 (authority over rates for customer premises equipment limited).

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm...

Courts have held that these "anti-donation" clauses prohibit public officials from making retroactive payments or refunds of money where that money was already validly collected or withheld. *See, e.g., People ex rel Schmidt v. Yerger*, 172 N.E.2d 753 (Ill. 1961) (retired fireman cannot constitutionally be given an increased pension by amendatory act adopted after his retirement); *Chicago Motor Club v Kinney*, 160 N.E. 163 (Ill. 1028) (statute requiring refund on motor fuel was void as making gift from public treasury); *City of Yakima v. Huza*, 407 P.2d 818 (Wash 1965) (return of tax money validly collected, because of repeal of taxing statute, constitutes unconstitutional gill of public money). Moreover, even where money has been collected or withheld improperly, refunds inay be unconstitutional. Ariz. Op. Att'y Gen. 187-103 (1987) (award of back pay to teacher an unconstitutional gift of public funds, even where salary was miscalculated, since previous year's contract was accepted and completed)

In light of these prohibitions on the gifting of public money, local government officials would he in violation of their respective constitutions were they to refund the franchise fees they have already collected under a valid interpretation of the law. In fact, even if it were conceded that a misinterpretation of the law resulted in the collection of the fees, as in the case of the teacher's contract above, the franchise agreements were accepted and completed. Thus, in most cases public officials may nut legally refund the fees. Statutes may be repealed, statutory text may change, textual interpretations may vary from year to year. but regardless, once validly collected, refunds are unconstitutional gifts of public funds.

Once again, it is difficult to imagine that Congress would have given the Commission the authority to overrule such a fundamental state policy without actually saying so.

VII. CUSTOMER SERVICE AND SUBSCRIBER PRIVACY CONCERNS SHOULD BE PARAMOUNT.

The Commission's purpose and mission must be to further consumers' interests in modern services, fairly priced and fairly delivered. This is the same purpose and mission of local franchise authorities.

As we discussed in our initial comments, the Cable Act expressly allows local governments to impose customer service requirements on cable operators and adopt privacy rtilcs, without reference to the services they provide. For its part, the Commission adopted no regulations to protect consumers subscribing to cable modern services. This system works, There is no need to look elsewhere: Congress has chosen lo allow local governments to address customer service and privacy issues related to cable modem service, and the Commission has not interfered in that decision to date. There are good legal and policy reasons for the Commission continuing to respect and preserve local authority over customer service and privacy.

A. The Absence of Competition Requires Regulation.

The industry claims that Title VI customer service standards only apply to cable service, not cable modem scrvice, and that competition will drive good customer service.[120] The language of the Cable Act states otherwise.[121] Reasons lo distinguish between cable modern scrvicc and cable service don't justify striking all cable modem customer service regulation

[120] Comments of Comcast at 32-33; Comments of Cablevision at 16. *See also* Snowden letter.

[121] 47 U.S.C. § 552 states, in full:

Sec. 552. Consumer protection and customer service
(a) Franchising authority enforcement. A franchising authority may establish and enforce--
(1) customer service requirements of the cable operator; and
(2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.
(b) Commission standards. The Commission shall, within 180 days of October 5, 1992, establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing-

Cable Modem Service Has Dominant Market Power in Many Communities.

It is important to bear in mind that the cable modem service market is not a perfectly competitive business. The cable modem industry clearly dominates the residential broadband market. As of the end of May, Kinetic Strategies calculates that cable modem subscribers make up three-fourths of the residential broadband market. Of the 12.2 million subscribers, over 8 million use cable modem, and not quite 4 million use residential DSL.[122] Many cable modem subscribers cannot receive DSL service at all, and do not consider low-speed services suitable substitutes. Thus, cable modem providers have an effective monopoly in large parts of their service areas and are not subject to market discipline.[123] The Commission itself recognizes this dominance in the *NPRM*, and to ignore the effects of such dominance will harm consumers.

(1) cable system office hours and telephone availability;
(2) installations, outages, and service calls; and
(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

(c) Subscriber notice. A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 543(b)(6) of this title or any other provision of this chapter, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

(d) Consumer protection laws and customer service agreements

(1) Consumer protection laws. Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.

(2) Customer service requirement agreements. Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b) of this section. Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

[122] *Cable Modem Market Stats and Projections*, Cable Datacom News, May 30, 2002, *available at* http://www.cabledatacomnews.com/cgi-bin/printer.cgi.

[123] *See generally*, C. Murray, G. Kimmelman, M. Cooper, *Abusing Consumers and Impeding Competition: The State of the Cable Television Industry, 2002*, Consumers Union, July 24, 2002.

Furthermore, even if one assumes that DSL and dial-up services are true competitors to cable modem service, they are no guarantees of good customer service. Traditional cable service itself has competitors, in the form of DBS, over-the-air broadcasters, and the occasional overbuilder. Yet there are still legions of dissatisfied cable subscribers. A recent survey by the American Society for Quality found that customer satisfaction in the cable and satellite sector is at 61% and falling.[124] Another research firm found that only 69% of cable subscribers surveyed were satisfied with their service.[125] A recent article in Consumer Reports compared cable subscriber satisfaction with consumer satisfaction in four other industries (telephone, airlines, baking, and electricity) and cable came in last; in fact, overall satisfaction with cable service has not improved in the last 12 years.[126] The presence of two or three partially available alternatives or substitutes is not enough to assure good customer service.

Local authority over cable modem customer service issues is necessary. Preemption would leave cable operators free of any third party discipline, and give them no incentive to improve customer service. This runs counter to the premise underlying the Cable Act, and the whole purpose of administrative regulation of industry. Unregulated monopolies and duopolies must be regulated to restrain them from abusing their market power. The Commission is not staffed to deal with this problem. The City of Chicago alone receives 5,000 to 10,000

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[124] Shirley Brady, *The Bottom Line on Customer Satisfaction*, Cable World, July 15, 2002, at 58. Specifically, Time Warner scored a 61% and Charter dropped to a 53% rating. A business professor who helped design the American Customer Satisfaction Index compares the reputation of the cable industry with that of the IRS. T. Johnson, *Cable companies can't escape user complaints*, Newark Star-Ledger, June 2, 2002.

[125] *Id.*

[126] *See, generally*, C. Murray, G. Kimmelman, M. Cooper, *Abusing Consumers and Impeding Competition: The State of the Cable Television Industry, 2002*, Consumers Union, July 24, 2002.

complaints from cable customers a year.[127] Even at the current lower penetration rates for cable modem service, local regulators can better handle the problem.

2. *Local Franchising Authorities Must Have Authority To Address Customer Service Abuses.*

As ALOAP noted in its initial comments at 16-19, cable modem and cable services are integrated in the eyes of the consumer, and it is important that the consumers of this new service have confidence that their concerns will be addressed in a timely fashion.

The industry touts its customer service in its comments,[128] but local governments can attest to the fact that cable modem customer service is a continuing problem. Local governments are now receiving complaints about cable modem service, and have every reason to expect this to continue. *See* ALOAP Comments at 17; Snowden Letter. Consumers are turning to local governments as the obvious regulator in large part due to the bundling of cable and cable modem services. Indeed, consumers who turn to the Commission are sent back to their local government. *See* Snowden Letter. Local standards actually provide a safety net for those consumers, providing consumers assurance that if they pay the expense of obtaining broadband, they will receive reliable service for the money. That assurance allows the industry to grow. The industry may prefer avoiding regulation, even where there is no effective competition. But that discipline will actually help the market by promoting subscriber confidence. Without it, cable operators may maximize their profits -- but that is not the same thing as maximizing the utility of the entire market.

[127] G. Washburn, *Chicago Mayor Calls for Bill of Rights for Cable Customers*, Chicago Tribune, July 31, 2002, *available at* http://www.consumersunion.org/pdf/cable2002.pdf.

[128] Comments of Arizona Cable Telecomm. Ass'n. *et al* at 28; Comments of Cablevision at 5.

Some argue that generally applicable consumer protection laws will fill the void.[129] But ALOAP believes that locally established franchise or cable ordinance provisions have proven much more effective and available to local consumers than generally applicable consumer protection laws. That is why Congress adopted Section 632. Such general laws serve useful purposes, but they are not tailored to the realities of the details of cable modem service. Thus, they will guarantee litigation that will create market uncertainty and delay as officials, operators, and consumers contend over how exactly generic laws will apply to the cable modem business.

B. Privacy Rules Under § 631 Do Apply to Cable Modem Service.

Those industry commenters that address the issue admit that the privacy restraints in Section 631 do apply to cable modem service, as it constitutes an "other service."[130] But industry commenters ask the Commission to forbear from such regulation, in the name of regulatory parity.[131] Some commenters also seek preemption of local authority, despite Section 631(g), which states that "[n]othing in this title shall be construed to prohibit any state or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy."

For example, AT&T asks the Commission to preempt the privacy provisions of Seattle's Cable Customer Bill of Rights.[132] That ordinance is designed to conform to federal law by

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[129] Comments of Arizona Cable Telecomm. Ass'n. *et al.*, at 27.

[130] Comments of NCTA at 54; Comments of Comcast at 40-41; Comments of the Electronic Privacy Information Center; Comments of AT&T at 40-42.

[131] Comments of NCTA at 55; Comments of Comcast at 33-34.

[132] We also urge the Commission to consider the applicability of Sections 1.1206 and 1.1204 of its rules in this instance. Those rules include notes requiring that in the event of any petition for rulemaking or declaratory ruling seeking preemption of state or local regulatory authority, the petitioner must serve the original petition on the state or local government whose provision is being challenged. To the extent that AT&T or any other commenter in this proceeding has

addressing matters not addressed in Section 631 without conflicting with its express provisions. For instance, Section 631 prohibits a cable operator from disclosing personally identifiable information concerning a subscriber without the subscriber's consent. But the statute does not address how that consent is to be obtained. The Seattle ordinance establishes a mechanism for notifying subscribers of an intended disclosure, and a mechanism for the subscriber to respond. The federal statute does not address this issue, and therefore there is no conflict with federal law. AT&T asks the Commission to preempt despite the lack of any conflict. AT&T may not like the City's procedure, but that does not render it unreasonable. In any case, Congress has left such matters to the City's discretion.

Finally, the Commission should take note that in the one place where the industry admits it is subject to local regulation, it asks the Commission to treat it like other providers. In all other instances, the industry argues that regulatory parity does not require cable modem providers to be regulated in the same manner as other providers. (For instance, regulatory parity does not require unbundling, open access, tariffed services, or universal service contribution payments)

Privacy is an important issue to consumers, and Section 631 does apply. The Commission should not attempt to waive a relevant, appropriate statute when Congress has expressly preserved local authority to protect subscriber privacy.

effectively sought such preemption, therefore, by identifying a specific local requirement as an example of the type of provision that should be preempted, we believe that the commenter should be required to comply with these provisions

CONCLUSION

The Commission has decided that cable modem service and cable service are mutually exclusive. That decision has consequences. Congress and the Commission are bound by Constitutional principles ranging from Fifth Amendment property rights to the basic federal structure of our government. These principles require that local authority manage its real property and obtain compensation with respect to its use. Providers of information services do not get a free pass around the Constitution, federal and state law. Local governments would prefer the legal certainty of cable modem service as a cable service. The Commission has chosen otherwise. Now the only way to preserve and protect local authority in the wake of the Declaratory Ruling is to recognize that cable modem service has no special privileges and is subject to the same local laws and regulations as other businesses seeking privileged use of public property - the public rights-of-way.

ALOAP respectfully urges the Commission to refrain from any action that would affect local authority over cable modem services.

Respectfully submitted,

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SUMMARY OF CTC REPORT & SUPPLEMENTAL REPORT
Attached as Exhibit G, ALOAP Comments & Exhibit D, ALOAP Reply, CS Docket No. 02-52

Andrew Afflerbach, Ph.D., P.E., and David Randolph, P.E. are principal engineers at Columbia Telecommunications Corporation, an engineering firm that specializes in advising local governments in cable television and other communications-related matters. The firm is a leading expert in the design of institutional networks and cable television technology generally

Dr. Afflerbach and Mr. Randolph prepared. "The Impact of Cable Modem Service on the Public Right-of-Way," June 2002 (the "CTC Report"). attached as Exhibit G to the ALOAP Comments. for the purpose of illustrating the differences in network architecture between a cable service-only system and a system designed and built to provide cable modem services as well as video services. Dr. Afflerbach and Mr. Randolph reviewed the industry's assertions regarding right-of-way burdens as presented in the initial comment round to prepare a supplemental report ("CTC Supplemental Report"). attached as Exhibit D to the ALOAP Reply Comments.

The CTC Report concludes that "cable modem service burdens the public right-of-way significantly more than does video-only cable service, because modem service requires a far more elaborate cable system than does video." Among other things: upgrading cable systems to provide cable modem service often requires installation of additional and significantly larger power supplies and electronic equipment cabinets. In addition, in order to provide adequate upstream capacity for non-cable services, the operator will typically install more nodes, and more fiber.

The CTC Report concludes that cable modem systems are different from cable-only systems, impose greater burdens on local governments and make more extensive use of public property. Beginning in the 1990's and continuing today. cable operators have engaged in extensive construction in the public rights-of-way as they have upgraded their systems so they could provide cable modem services. The CTC Report notes that none of this extensive construction would be necessary simply to provide video-only services.

In preparing the CTC Supplemental Report. the authors reviewed the industry's assertions regarding right-of-way burdens. The CTC Supplemental Report points out that in addition to the burdens arising out of differences in engineering design pointed out in their initial

report, cable modem service imposes another, very extensive additional burden on the rights-of-way: the need to install conduit to protect fiber optic cable. The coaxial cable used in traditional cable systems can be buried directly in the ground – but operators must replace much of that coaxial cable with fiber optic cable when they upgrade their systems to provide cable modem service. Thus, there continue to be very basic and significant differences between the burdens imposed by the construction of a video-only coaxial cable system, and a fiber optic cable system capable of providing cable modem and broadband service.

Finally, the two CTC reports deal only with the current practices in the industry. They do not speculate about possible future needs or changes in practices. If current systems prove inadequate, or if greater demand for cable modem service does develop in the future, the replacement facilities will place additional burden on the rights-of-way. For example, if the long-sought "killer app" ever arrives, upstream bandwidth needs could increase sharply: requiring the construction of additional nodes and hubs and even additional small headends.[1] This would not be the case with a video-only system. Finally, cable operators traditionally viewed their service as only a residential service, and often do not extend their networks deep into business districts. But small businesses have become a growing market for cable modem service – and this requires extending networks into parts of communities that often were not served by traditional video networks.[2]

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[1] Cable operators have anticipated this problem to some degree, by designing and building "scalable" networks that allow for relatively easy expansion of bandwidth. But if this is not done, new nodes and other equipment may be required in the rights-of-way. *See, e.g.* E. Schweiter, J. Tinol, J. Doblegust, "Scalable Architectures that Break the Bandwidth Barrier for Digital Services," Proceedings Manual, Cable TEC Expo (June 98), at 235-36. And even a scalable network will have bandwidth limits which may be exceeded if demand reaches unanticipated levels.

[2] J. Yatsko, "Unlocking the Full Potential of HFC Networks with Integrated IP Broadband Services," Proceedings Manual, Cable TEC Expo 2001 (May 2001), at 179. "Small and Medium business (5 to 100 employees) will represent a significant market opportunity for broadband service providers … [C]able is well positioned to serve this segment with a wide array of new services …. Current and future Internet Applications and Services will continue to stress the probabilities of today's broadband networking." *Id.* at 179-80.

SUMMARY OF ED WHITELAW ECONOMIC REPORT

Attached as Exhibit C to *ALOAP* Reply Comments, CS Docket No. 02-52

Attached as Exhibit C to the ALOAP Reply Comments is the Declaration and Cumculum Vitae of Ed Whitelaw (the "Whitelaw Report"). Dr. Whitelaw holds a Ph.D. in Economics from MIT and is President of ECONorthwest, an economics consulting firm.

The Whitelaw Report explains that even if a cable modem service provider is already paying a fee based on its revenues from providing cable service, economic principles require that the provider pay an additional amount, to rctlect the additional value to the provider of the additional use it is making of the rights-of-way. Not charging a fee would distort economic incentives and, from the point of view of society, lead to overconsumption or other wasteful and inefficient uses of the right-of-way.

Sound economics concludes the societal point of view should control. A cable operator may be using the right-of-way very efficiently from its own perspective – *i.e.*, at low direct cost to the cable operator – hut that use may at the same time be wasteful from the point of view of other potential users, or the sum total of all uscrs.

Any use by a service provider imposes costs on others, including not only the costs of repairing the roadbed, but less tangible *costs* such as traffic delays. Inefficient use by one provider may also impose additional costs on other right-of-way users, through unnecessary make-ready, design, modification, and repair costs. The cable operator may be providing many services and using the right-of-way very profitably -- but if it is not paying fair market value for that use, society as it whole may he worse off.